Supreme Court, U.S.
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No. 99-701

# IN THE
# SUPREME COURT OF THE UNITED STATES

JANICE BOWERS WOLK,
*Petitioner*,

v.

UNUM LIFE INSURANCE
OF AMERICA,
*Respondent*.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

## REPLY TO BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED FOR REVIEW

1. The Third Circuit in this case held that a partner/employer who obtained an individual disability insurance policy related to a group policy that covers employees must pursue remedies for wrongful denial of policy benefits under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 et seq., and not under state law. The Third Circuit reasoned that ERISA applied because the partner/employer is a "beneficiary," as defined in 29 U.S.C. § 1002(8), of an "employee welfare benefit plan," as defined in 29 U.S.C. § 1002(1), maintained for "participants and their beneficiaries," as set forth in 29 U.S.C. § 1002(1). There is an irreconcilable conflict in the circuit courts on this issue: Six Circuits (the First, Fourth, Fifth, Sixth, Seventh and Tenth Circuits) have held that employers wrongfully deprived of employment benefits are not subject to ERISA and therefore must proceed under state law, and four Circuits (the Third, Eight, Ninth and Eleventh Circuits) have reached a contrary conclusion. The question presented is whether an employer wrongfully deprived of self-acquired employment benefits is subject to ERISA, 29 U.S.C. § 1132(a), and is therefore precluded from seeking traditional state law remedies.

2. Whether application of ERISA, 29 U.S.C. § 1001 et seq., to redress injuries suffered by an employer wrongfully deprived of self-acquired employment benefits preempts traditional state law remedies in contravention of constitutional principles of federalism because ERISA does not unambiguously require such a preemption and because such a preemption conflicts with the legislative purpose of ERISA as expressed in 29 U.S.C. § 1001.

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## I. UNUM Sidesteps the Fundamental Issue of ERISA's Applicability to this Litigation by Asserting that Mrs. Wolk has Conceded that the Policy is an "employee welfare benefit plan."

By asserting that Mrs. Wolk is covered by an "employee welfare benefit plan," UNUM necessarily avers that Mrs. Wolk is either an ERISA "participant" or "beneficiary." An "employee welfare benefit plan" is a "plan, fund, or program ... established or []maintained for the purpose of providing for its participants or their beneficiaries" certain benefits. 29 U.S.C. § 1002(1) (emphasis added). UNUM and the Courts of Appeal upon which it relies have conceded that an employer such as Mrs. Wolk is not an ERISA "participant." 29 U.S.C. § 1002(7) ("'participant' means any employee or former employee of any employer"). Moreover, UNUM has never asserted that Mrs. Wolk is the beneficiary of a "participant." UNUM cannot reconcile the statutory conflict that arises if Mrs. Wolk allegedly is covered by an "employee welfare benefit plan" even though she is neither a participant in such a plan nor a beneficiary designated by a participant in such a plan. ERISA therefore does not apply to this litigation because federal preemption of state law cannot rest upon tautological statutory construction.

Furthermore, contrary to UNUM's contention in its Brief in Opposition to Petition for Writ of Certiorari ("Brief in Opposition"), Mrs. Wolk has never conceded that the Policy is an ERISA employee welfare benefit plan as it pertains to her. In response to UNUM's motion for summary judgment, Mrs. Wolk averred that "the Plan is not an ERISA [employee welfare benefit] Plan with respect to Janice Wolk, as one of the Firm's partners." (Brief in Opposition to

Defendant's Motion for Summary Judgment, at 7). Mrs. Wolk reiterated in her appellate brief to the Third Circuit that the group long-term disability insurance policy that Eckert Seamans purchased was an ERISA employee welfare benefit plan as it related to the employees of the Firm. (Brief of Appellant to the United States Court of Appeals for the Third Circuit, at 15). Mrs. Wolk disputed, however, that the Policy was an ERISA employee welfare benefit plan as it pertained to the Firm's partners. Throughout this litigation, Mrs. Wolk has maintained that UNUM's positions ignore ERISA's careful distinctions between employer and employee and thus broaden the scope of federal jurisdiction, giving rise to important questions of federal preemption that only this Court can adjudicate.

## II. UNUM previously Posited that there is a Conflict among the United States Courts of Appeals on the Issue of whether an Employer is Subject to ERISA.

UNUM now claims in its Brief in Opposition to this Court that the United States Court of Appeals are in accord and have held uniformly that employers are subject to ERISA. (Brief in Opposition, at 13). In its brief to the Third Circuit, however, UNUM submitted that the First, Sixth and Tenth Circuits support Mrs. Wolk's position that an employer deprived of self-acquired employment benefits is not subject to ERISA. (Brief of Appellee, at 10).

## CONCLUSION

For these reasons, the Petition for Writ of Certiorari of Janice Bowers Wolk should be granted, the Third Circuit Opinion dated June 30, 1998 should be vacated, and the judgment of the United States District Court for the Western District of Pennsylvania dated March 31, 1998 should be reversed.

Respectfully submitted:

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